79-1590

FILED
APR 4 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

JOSEPH NOLAN, the younger

Petitioner

vs.

STATE OF MARYLAND

Respondent

APPENDIX

Harold I. Glaser

Richard M. Karceski
1504 Arlington Fed. Bldg.
Baltimore, MD 21201

Attorneys for the Petitioner

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Attorneys for the Petitioner

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

September Term, 1979

No. 171

JOSEPH NOLAN, the younger

v.

STATE OF MARYLAND

Mason
Couch
MacDaniel,
JJ.

PER CURIAM

Filed: October 31, 1979

Following his conviction and sentencing for felony murder, kidnapping, and extortion, in a jury trial in the Criminal Court of Baltimore, Joseph Nolan, Jr. appeals, raising these questions:

"1. Did the trial court err in admitting the hearsay testimony of Calvin Washington concerning statements made by Michael Evans in the absence of sufficient independent evidence to establish a conspiracy between Evans and Appellant?

2. Did the trial court err in admitting an unsigned letter which was either hearsay testimony or unsupported by a sufficient foundation connecting it to Appellant?

3. Did the trial court abuse its discretion in qualifying a six year old witness who had no conception that it is necessary to tell the truth in court and did not believe it is wrong to tell a lie?

4. Did the trial court err in denying the motion to withdraw brought by Michael Kaplan at the request of his client, Helen Nolan?"

Finding no error, we shall affirm.

The factual background leading to appellant's convictions will be stated briefly, with further facts supplied as necessary to discuss the various issues. On May 1, 1978, Mrs. Godfray received a telephone call from an individual, whom he identified as appellant, in which she was advised that the caller had her son, Tony Howe, and that she would have to pay $300.00 to get him back. This call prompted Mrs. Godfrey to call the police, who

responded to her home where she told them where appellant lived. At appellant's home the police found appellant Michael Evans, and Calvin Washington. They were asked if they had seen Tony Howe, to which there was a negative response. Thereafter, the police, the appellant, and his two companions returned to Mrs. Godfrey's home where Tony's younger sister, Angilene, told the officers that she had seen Tony with appellant and Evans earlier in the day. Based on this information, appellant and Evans were taken into custody and transported to Northwestern District where appellant was questioned, with his parents in attendanse at all times. During this questioning appellant ultimately stated, "I will show you where he is." Appellant then directed the police to the city dump on Cold Spring Lane and to a quarry located in the dump. Appellant showed the police where he had last seen Tony on the rocks in the quarry. Appellant was then taken to the Homicide Office, while other officers began a search of the quarry for Tony; this search was subsequently suspended due to darkness. Meanwhile a search, upon a warrant, was made of the Evans home and a tennis shoe and shirt, stipulated as belonging to Tony, were found. Early the next morning the search of the quarry was resumed which ultimately resulted in the discovery of the body of Tony Howe. Appellant, testifying in his own behalf at trial, stated that although he was present when Tony was pushed into the quarry, he did not participate in the act. He also denied making the phone call to Mrs. Godfrey.

A. Did the trial court err in denying a motion to withdraw filed by appellant's attorney?

Appellant's attorney, Michael Kaplan,

was retained to represent him by Nolan's mother since appellant was only fourteen years old. About six weeks before trial the attorney filed a motion to withdraw as appellant's counsel, at the request of appellant's mother. A hearing was held during which it was developed that the reason for the mother's request was that she felt there had been a breakdown in communications between her son and Mr. Kaplan. It became apparent however, that this breakdown, if there was such in existence, was due solely to appellant's feeling that Mr. Kaplan did not appear at the jail to see appellant at a time when the attorney said he would be there. Appellant advised the court that he had no other problems with the attorney. The State did not oppose the motion but made it clear that it wanted the trial to go forward on the assigned date. Mr. Kaplan advised the court he had no difficulties with continuing to represent appellant. The trial court denied the motion.

In Wright v. State, 32 Md. App. 60, 359 A.2d 1 (1976), we stated:

"It is fundamental that in the absence of a specific and substantial reason for substitution of counsel, the question of whether to permit a change of counsel is a matter committed to the sound discretion of the trial court." [Citations omitted.]

Id. at 62. In our view, no abuse of discretion can be found in the denial of the motion by the trial court. There was no complaint by appellant or his mother that Mr. Kaplan was not representing him, nor could not represent him, adequately. Appellant's only complaint was that Mr. Kaplan did not keep some appointments or arrived late. We believe the proper administration of justice

should not be impaired for frivolous reasons. While it appears the trial of the case may not have been delayed for an undue length of time, this, of course, is conjecture. Under the circumstances, we do not believe the trial judge abused his discretion.

B. Did the trial court err in admitting hearsay testimony of a co-conspirator in absence of sufficient independent evidence of a conspiracy?

During its case-in-chief, the State called Calvin Washington as a witness through whom it was shown that he visited Michael Evans on May 1, 1978 and, over appellant's objection, he related a conversation he had with Evans in which he said Evans told him, "Me and Junie killed Sharon's little brother." (Junie was appellant's nickname.) Washington was also shown a tennis shoe and shirt in Evans' backyard and was told they belonged to the little boy and that they were going to give them to the boy's mother for money. Appellant argues, and the State concurs, that this constituted hearsay; they part company at this point, however. The State argues that since it had established the existence of a conspiracy by independent evidence, these statements fell within the co-conspirator exception to the hearsay rule. In Mason, Taylor and Taylor v. State, 18 Md. App. 130, 305 A.2d 492 (1973), cert. denied, 269 Md. 763, 767, cert. denied, 416 U.S. 907, we said:

". . . the rule is that when the State seeks to use statements against a co-conspirator made by another co-conspirator to a third party, it must first demonstrate, through evidence aliunde, the existence of a conspiracy, . . . "
Id. at 136-37. Our independent review

persuades us that the State had met its burden of establishing the existence of a conspiracy. There was testimony earlier in the trial that on the day before the incident appellant and Evans told Tony's sister they were going to kidnap a member of her family and that on May 1 appellant and Evans asked the sister for the whereabouts of Tony. The sister also testified that near dinnertime on May 1 appellant called her on the telephone and admitted he and Evans had killed Tony. Furthermore, Mrs. Godfrey had testified that appellant called on May 1 and demanded $300.00 for Tony's return. Finally, Tony's clothes were discovered at Evans' home. We believe this evidence sufficient to independently establish a conspiracy to murder, kidnap, and extort on the part of appellant and Evans.

Appellant argues alternatively that the conspiracy had terminated (assuming it existed) since Evans made the statement to Washington after Tony was kidnapped and killed and thus the statement was inadmissible. We disagree with appellant since the extortion was ongoing; therefore, it is clear the entire conspiracy had not terminated when the statement was made. In Greenwald v. State, 221 Md. 245, 157 A.2d 119 (1960), appeal dismissed, 363 U.S. 721, the Court of Appeals stated:

"... if the conspiracy contemplated the continuous cooperation of the conspirators in the perpetration of a series of offenses ... it was in effect 'a partnership in criminal purposes,' and continued until the time of its abandonment or the final accomplishment of its purposes."

Id. at 250-251. We find no error here.

C. Did the trial court err in admitting into evidence an unsigned letter?

In the course of the cross examination of appellant he was shown an unsigned letter,[1] which was addressed to Sharon, the victim's sister. The State's Attorney attempted to demonstrate that appellant had authored the letter, but he denied it. Although timely objection was made, the witness was allowed to read the letter to the jury and it was subsequently offered and admitted into evidence. Appellant argues that since the letter was unauthenticated and unsigned, it was inadmissible since it amounted to unsworn hearsay testimony, citing Parker v. State, 12 Md. App. 611, 280 A.2d 29 (1971) and DiPietro v. State, 31 Md. App. 392, 356 A.2d 599 (1976). The State contends the letter was authenticated by its contents, i.e., that the letter must have been written by appellant since it contained information that only appellant would know, citing McCormick on Evidence, 2nd Ed., Sec. 225, p.552 (1972). We need not address the question of whether an unsigned writing may be authenticated by the alternate route of authentication of contents because we believe the admission of the letter to be merely cumulative in any event. Cf. Dorsey v. State, 276 Md. 638, 652-53, 350 A.2d 665 (1976). A reading of the letter demonstrates

1. "Dear Sharon, how are you doing? Fine I hope. This is a good letter. I called your cousin's house looking for you. Right now I am not going to put my name but take a guess who it is. You should know. Well, I am doing fine. Tell your stepfather I said fuck him. My friend Jun want you back, so write him at this address. 401 E. Eager Street, Baltimore Maryland 21202. Name, sorry. Can't give you the name but take a guess. Section G, Bed 52. It used to be your boyfriend's"

that the author was expressing animosity to Sharon's stepfather, a fact which easily could have been gleaned from previous testimony that the stepfather had forbidden Sharon from seeing appellant anymore. Further, the letter indicated that "Jun" wanted her back, certainly not evidence indicating complicity in the pending charges. In our view, even if the admission of the letter was error - a point we do not decide - it was harmless.

D. Did the trial court err in qualifying a six year old witness?

Angeline Howe, six years old and a sister of the victim, was offered as a witness by the State. Prior to being sworn, the State asked her a series of questions, obviously designed to determine whether the witness knew the difference between telling a lie and telling the truth, as well as knowing the consequences of telling a lie. Appellant contends that because of certain responses made by the witness she exhibited a questionable comprehension of the need for testifying truthfully. Appellant concedes that the capacity of children to testify is within the sound discretion of the trial court. See Reckard v. State, 2 Md. App. 312, 234 A.2d 630 (1967), cert. denied, 248 Md. 734 (1968). Nevertheless, appellant contends this discretion was abused because there was no showing the witness demonstrated that she appreciated the obligation of an oath; indeed, she was not even asked. We have reviewed the record and while the witness did not know what would happen if she told a lie in court, she clearly exhibited an understanding of the difference between a lie and the truth, and the consequences of telling a lie, i.e., she would be punished. Furthermore, she promised to tell the truth in her testimony. It is evident

that the trial judge found, and we cannot say he was wrong, that the witness understood the difference between telling the truth and telling a lie. We find no abise of discretion in the judge's finding that she was competent to testify. See Williams v. State, 11 Md. App. 350, 274 A.2d 403 (1971).

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

MANDATE

COURT OF SPECIAL APPEALS OF MARYLAND

No. 171, September Term, 1979

JOSEPH NOLAN, THE YOUNGER * October 31, 1979
* Per Curiam filed.
VS. * Judgments affirmed
* Costs to be paid
STATE OF MARYLAND * by the Appellant.
*
*November 30, 1979.
*
*Mandate issued.
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STATEMENT OF COSTS:

In Criminal Court of Baltimore

Record	30.00
Stenographer's Costs	1,374.00

In Court of Special Appeals:

Filing Record on Appeal	30.00
Printing Brief for Appellant	NOT SUPPLIED
Reply Brief	
Portion of Record Extract - Appellant	
Printing Brief for Cross-Appellee	
Printing Brief for Appellee . . .	40.00
Portion of Record Extract - Appellee	
Printing Brief for Cross-Appellant	

STATE OF MARYLAND, Sct:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Special Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Special Appeals, this thirtieth day of November, A.D. 1979

/S/ Howard E. Friedman
Clerk of the Court of
Special Appeals of Maryland.

Costs shown on this Mandate are to be settled between counsel and NOT THROUGH THIS OFFICE.

JOSEPH NOLAN, the Younger *
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v. *
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STATE OF MARYLAND *
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IN THE
COURT OF APPEALS
OF MARYLAND

Petition Docket No. 374

September Term 1979

(no. 171, Sept. Term, 1979 Court of Special Appeals)

O R D E R

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Marvin H. Smith
Senior Judge

Date: January 4, 1980

CERTIFICATE OF MAILING

I hereby certify that on this 8th day of April, 1980 three copies of the aforegoing Petition for Writ of Certiorari and Appendix to the Petition were mailed to the Office of the Attorney General, Eighth Floor, U.S. Court House, 101 W. Lombard Street, Baltimore, Maryland 21201.

Harold I. Glaser
HAROLD I. GLASER